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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 914

THE NEW YORK CENTRAL RAILROAD COMPANY; ERIE-LACKAWANNA RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE LONG ISLAND RAIL ROAD COMPANY; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor; LEHIGH VALLEY RAILROAD COMPANY; BOSTON AND MAINE RAILROAD; THE DELAWARE AND HUDSON RAILROAD CORPORATION; THE BALTIMORE & OHIO RAILROAD COMPANY; and THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellants,

—against—

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York; and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; and LEONARD RUBENFELD, as District Attorney of Westchester County,

Respondents,

—and—

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN,

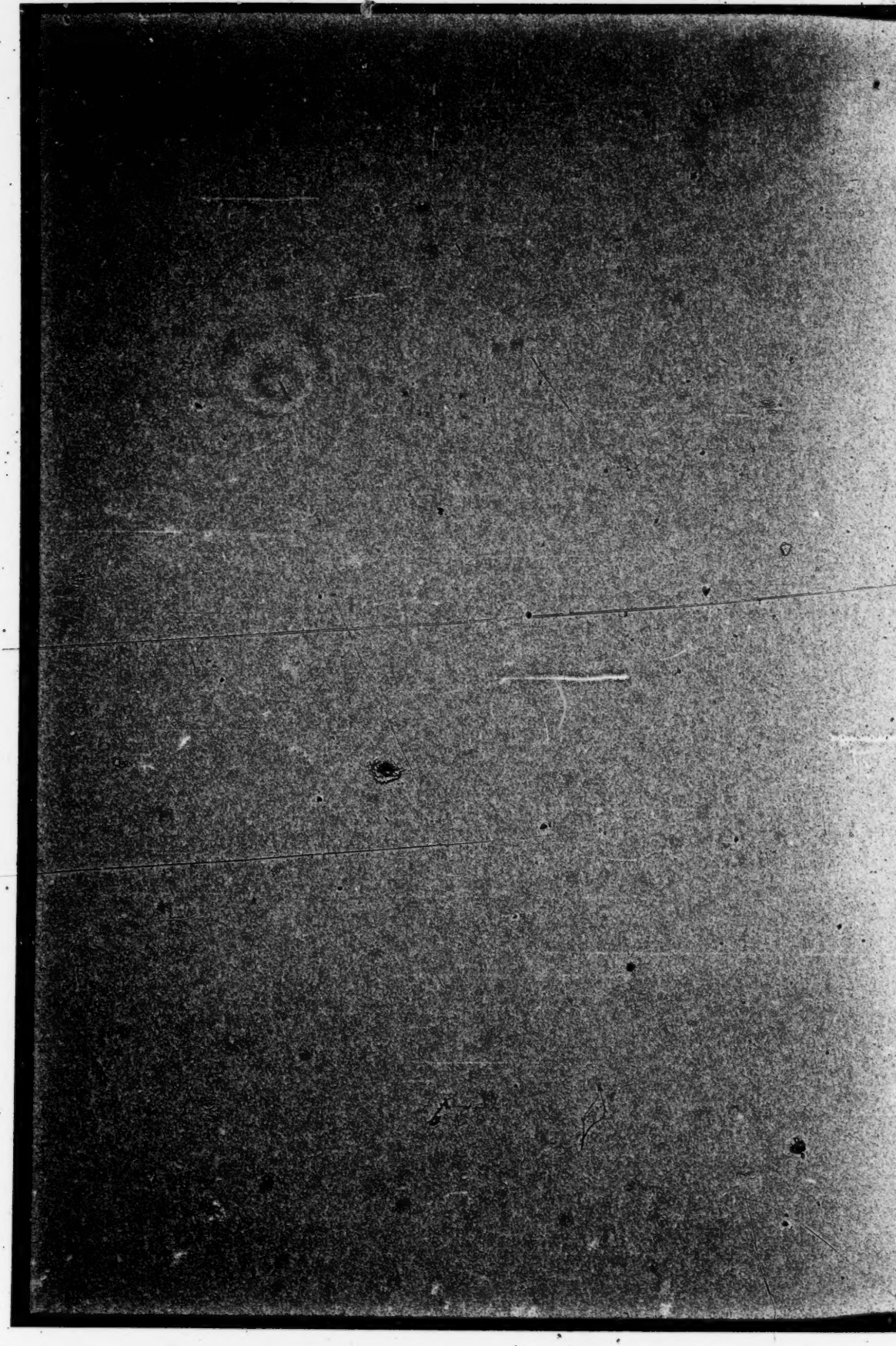
Intervenors-Respondents.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

JOHN A. WELLS
CAESAR L. PITASSY
DAVID F. DOBBINS
IAN R. GILBERT
200 Park Avenue
New York, New York 10017

Of Counsel:
GERALD E. DWYER
New York, New York
VICTOR F. CONDELLO
New York, New York
ROYALL, KOEGEL, ROGERS & WELLS
New York, New York



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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the trial court dismissing the action on the merits on April 8, 1965, 46 Misc. 2d 68, 259 N. Y. S. 2d 76 (Sup. Ct. Westchester Co. 1965), is printed in the Appendix to this Statement at A-1.* The trial court's judg-

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*Page references to the appendix included with this statement begin with the letter "A". Page references to the printed Record are followed by the letter "a", e.g., 5479a.

ment was affirmed without opinion by the intermediate appellate court, the Appellate Division, Second Department, on June 29, 1967, 28 A. D. 2d 735, 282 N. Y. S. 2d 68 (2d Dep't 1967). The memorandum decision of the Appellate Division is printed in the Appendix at A-56. The Court of Appeals, with one judge disqualifying himself, originally was evenly divided, and, accordingly, ordered reargument and designated a judge of the Appellate Division to participate in the appeal (A-77). Upon reargument, it affirmed the holding of the court below by a 4 to 3 decision, 23 N. Y. 2d 1, 241 N. E. 2d 730 (1968). The Court of Appeals opinion is printed in the Appendix at A-58.

JURISDICTION

This action was brought pursuant to Section 473 of the New York Civil Practice Act, seeking a judgment declaring Sections 54-a, 54-b and 54-c of the Railroad Law of the State of New York unconstitutional and enjoining their enforcement. These laws required minimum crews of five or six men in freight train and yard operations.

The action was originally brought by the ten plaintiffs, the ten major railroads ("Railroads") operating in New York, against the Attorney General of the State of New York, the Public Service Commission of the State of New York and the District Attorney of Westchester County.

The Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen ("BLF&E"), the Brotherhood of Railroad Trainmen and the Order of Railway Conductors and Brakemen, unions whose members filled the various positions required by these laws, intervened as parties defendant. During the trial, the Brotherhood of Locomotive Engineers, which represents most of the engi-

neers employed by the Railroads, and the Brotherhood of Railroad Trainmen, which represents most of the trainmen, withdrew from this action.

In June, 1966, Sections 54-a and 54-c were repealed. Laws of the State of New York, 1966, Chapters 693 and 694. These two sections set the minimum number of *trainmen* or *helpers* for yard and freight train crews. Section 54-b, which was not repealed, requires a *fireman* or *helper* on all diesel locomotives, and is the most important section in terms of cost to the Railroads and numbers of men required to be employed (555a; 2798a-2802a).

The opinion and order of the Court of Appeals are dated October 10, 1968; the judgment entered thereon by the Supreme Court of the State of New York for the County of Westchester is dated October 28, 1968 (5050a). The notice of appeal was filed with the Clerk of the Supreme Court of the State of New York for the County of Westchester on December 24, 1968 (5052a). The appeal is taken from the opinion and order of the Court of Appeals.

The statutory provision believed to confer jurisdiction of the appeal upon this Court is 28 U. S. C. § 1257(2). The cases believed to sustain the jurisdiction of this Court are *Smith* v. *Texas,* 233 U. S. 630, and *BLF&E* v. *Chicago, R. I. & P. R. Co.,* U. S. , 89 S. Ct. 323, 37 U. S. L. W. 4032 (November 19, 1968), to the extent that it and prior Arkansas full crew cases establish that this Court has exercised its appellate jurisdiction to review the constitutionality of state statutes regulating manning requirements on railroads.

THE CHALLENGED STATUTE

Section 54-b of the Railroad Law was enacted in 1936 and reads as follows:

> "No person, corporation, trustee, receiver or other court officer shall run or operate, or cause to be run or operated, on any railroad within this state any fuel-electric engine, unless said engine shall be manned with a crew of not less than one engineer and one fireman or helper. Each separate violation of the provisions of this section shall be a misdemeanor punishable by a fine of not less than one hundred dollars nor more than five hundred dollars. Each day that any such engine shall run in violation of the provisions of this section shall be deemed to be a separate offense. The public service commission shall enforce the provisions of this section."

QUESTION PRESENTED

WHETHER SECTION 54-b OF THE NEW YORK RAILROAD LAW AS INTERPRETED BY THE NEW YORK COURT OF APPEALS IS UNCONSTITUTIONAL CLASS LEGISLATION.

STATEMENT OF THE CASE

A. The Proceedings and the Presentation of the Federal Question.

The specific federal question presented on this appeal is whether a state can under the guise of exercising its police power constitutionally require a fireman as the second man on diesel locomotives to the exclusion of brakemen in the face of the indisputable fact that brakemen are as qualified as firemen to act as helpers on such locomotives. This issue was raised and passed upon in all of the lower courts. The New York Court of Appeals stated this issue in the following terms (A-61):

> In order to come to grips with the suggestion of plaintiffs that the statute is unconstitutional it is necessary preliminarily to decide two things: (a) whether section 54-b must be read as requiring the assignment of an additional engine crewman to help the engineer, and that this is not sufficiently met by the assignment of a front-end brakeman from the train crew; (b) if the statute is construed to require the helper to be a member of an engine crew, whether the requirement is rationally based in the promotion of safety. The opinion of the Special Term [the trial court] must be read as finding affirmatively on both aspects; and, if this is right, the statute is unexceptionable on constitutional grounds.

It resolved this issue in precisely the same way as the trial court did and, quoting from the trial court, stated (A-70):

> "The conclusion from all this was: 'Although there is room for argument, and the question may be fairly debatable, I do not find that it is unreason-

able to require, as the full crew statutes do, that a second man be present in the locomotive cab, or that the second man shall have, in addition to ability to act as lookout and read and pass signals, the training and qualifications *ordinarily* possessed by firemen, which *may* make it possible for him to be of assistance to the engineer in the operation of the locomotive". (Emphasis supplied)

B. The Facts

While so-called full crew laws have been before this Court many times, this case presents for the first time the question of whether a state can in the exercise of its police power constitutionally require a fireman to the exclusion of all other operating personnel as a "helper" to an engineer on a diesel locomotive. The New York Court of Appeals held that it could.

The proven, indisputable fact—not challenged by the New York Court of Appeals—is that firemen are sent out on the road with no more training or experience than brakemen (325a-26a; 1132a; 2941a). When such duties must be performed, the head brakeman calls signals, resets ground relays and operates the emergency brake valve on the left side of the locomotive (2102a; 2943a; 2947a; 3058a). Yet the Court of Appeals held that a brakeman cannot serve as a "helper" to the engineer. In effect, it excised the term "helper" from Section 54-b and held that the requirement in that section of a "fireman *or* helper" could only be satisfied by using a fireman.

This case does not concern itself with the issues posed by the full crew cases—whether it is constitutional to require a certain minimum number of men in a railroad crew. The Railroads do not now and never have claimed they intend to operate any diesel powered train, freight or

passenger, without two men in the cab of the locomotive. It is the invariable practice and rule on the Railroads that the head brakeman ride in the cab of the locomotive on freight trains (32a; 509a; 4624a; 4629a; 4758a; 4785a). As the New York Court of Appeals stated, "they [the Railroads] concede that in passenger trains where the front-end brakeman does not ride in the engine cab, there must be a helper specially assigned for the engineer and that in this effect on passenger train operation the statute is valid" (A-60).

Both the majority and dissenting opinions of the Court of Appeals were in agreement on the issue before that court and now posed to this Court. The dissenting opinion stated the issue as follows (A-74):

> "The evidence amply supports, and the railroads do not contend otherwise, that the presence of an assistant to the engineer however termed or titled, in the engine cab is justified at all times, except when occasions require that he fulfill his functions as assistant by signaling from the ground, as in yard service. That is not the issue in the case. The issue is whether safety requires that such an assistant be assigned to the engine crew, separate from the train crew. The argument that brakemen on the train crew do not or will not have the training or skills required to assist the engineer is blasted by the practice of the railroads in those States that permit it, and in neighboring Canada, to have some train crew brakemen so trained, and indeed, to be in the line of promotion to diesel engineers. Hence it is a false issue to argue that the engineer's assistant must have special training."

The undisputed fact of record is that firemen are no more assistant engineers than brakemen are. They are sent out on the road with no more training or experience than brakemen (325a-26a; 1132a; 2941a). In countless instances neither the firemen nor the brakeman is qualified to operate the engine (316a; 608a-09a; 1774; 2944a).

To sustain the constitutionality of excising the term "helper" from Section 54-b, the firemen's union argued in the lower courts that firemen were required to be able to operate the locomotive, and eventually to become fully qualified engineers. The record reveals that these arguments have no basis in fact.

On the New York Central (now Penn Central), which has the largest railroad operation in New York (4581a-89a), a man hired as a fireman goes out on the road after three rides as a student. This was explained by one of the railroad officials as follows (1132a):

> "What I am trying to say is that when we hire a fireman on the railroad we hire him as a fireman. All he has to do to hire out as a fireman is work three periods of 8 hours each with some individual. After that he is a fireman and he works as a fireman."

The training he receives prior to serving as a fireman is exactly the same as any other man hired for operations (a brakeman, train dispatcher or signal man) receives. Again, a railroad witness explained this (313a-16a):

> "Q. And now, General Rule C. provides:
>
> 'Employees must pass the required examinations.'
>
> Is that correct? A. Yes.
> Q. And is that still the rule? A. Yes.

Q. I show you a document which purports to be examination on rules of the operating department for train dispatchers, conductors, trainmen, engine men, firemen, operators, signal men and others who may be designated, and I will ask you whether——

The Court: Others who may be what, Mr. Shaw?

Mr. Shaw: Who may be designated.

Q. And I will ask you whether that is an examination book prepared by the operating department as an examination to be administered to the designated employees?

A. Yes."

"Q. Whether you have seen that particular piece of paper before, does this outline the procedure for taking these examinations as it is done on the New York Central?

A. In general, yes."

* * * *

"Q. Mr. Kenefick, General Rule Exhibit B provides:

'Employees must be conversant with and obey the rules and special instructions.'

This is an examination to determine whether they are conversant with the operating rules that we have been through, is that correct?

A. Yes.

Q. With respect to firemen what is the procedure for the training of a fireman, to your knowledge, from the beginning?

A. You mean if we were to hire a new fireman today?

Q. I mean if you were to hire a new fireman [373] today or in the recent past, what is the current procedure?

A. Well, after—I believe we discussed this morning physical examination, and he is given the rule book and so on.

The procedure varies somewhat from division to division, but the general rule is that a *fireman or any other similar employee* would be given some instruction by one of our safety supervisors—some instruction in the rules and shown the proper way to get on and off an engine so that he would not hurt himself; the proper way to display a fusee; the proper way to give and interpret hand signals.

Q. He would be instructed in the rule book, would he not?

A. Yes. And then he would make a certain number of so-called trips riding on an engine as an observer." (Emphasis added)

This procedure is the same as that used by the Canadian National Railway, which also operates within this state (A-83):

"Mr. Wilson testified that he is the local chairman for the Niagara Falls Lodge of the Brotherhood [BLF&E] and that he has been qualified as an engineer since 1953. He described the hiring procedure for firemen as consisting of a physical examination after which instruction in the rules is received, followed by three trial trips on the locomotive. Thereafter, following training in mechanical work and the writing of "year books," he qualifies as an engineer in yard and freight service. On cross-examination the witness said that the yard man [brakeman] also takes a physical examination and receives instructions on the same book of rules as

the fireman. The yard man takes three trial trips on which he receives instructions about the switches and the handling of cars.'"

Another argument with no basis in fact, yet consistently advanced by the BLF&E in the courts below for excising the term "helper" from Section 54-b, is that firemen are uniformly required to pass examinations for promotion to enginemen and that they are dismissed for failure to do so. Again records show the contrary. The rule on the Delaware & Hudson was explained by its general manager as follows (1774a):

"Q. You say that because he is given a second [2637] crack at them?

A. I can explain, Mr. Brook. He is given three trials at the first series, and if he misses the first trial he then drops on the roster below the men who have passed the examination. And then when we are ready to qualify more enginemen he has an opportunity for another trial and the same procedure is followed there. If he fails again he is given another chance later on, his third trial, and if he misses he is dropped on the roster, but he is not dismissed from the service.

The Court: What happens after that, Mr. Miller, as far as he is concerned?

The Witness: He stays as a fireman.

The Court. In road service?

The Witness: In any service."

The rule on the state's largest carrier, the New York Central, is similar (609a).

"Q. But he does not remain as a fireman in road service or yard service if he fails the third examination? He is relegated, as you say, to being a hostler in the round-house?

A. I didn't say that. He is a hostler in the round-house or he can be restricted to being a yard fireman."

Neither the BLF&E nor anyone else has ever claimed that the refusal of some Railroads to require their firemen to qualify as engineers constituted a violation of Section 54-b. Acquiescence in this refusal underscores the point that there is nothing in Section 54-b requiring the "fireman or helper" to qualify as an engineer and nothing in the statute preventing the Railroads from training other men as engineers.

Since the Railroads were by law and, until recently, by collective bargaining agreements, required to employ a member of the BLF&E, a so-called fireman-helper, training him as an engineer seemed to be the only way to salvage some value out of an inherently wasteful expenditure. The practice of training firemen to become engineers in large part stems from the demands of the BLF&E. These demands are part of the effort of the BLF&E to find some justification for the continued retention of the fireman. The BLF&E is responsible for the rules and regulations for firemen and it presses training programs for firemen with vigor (2933a). The refusal of some railroads to allow the BLF&E to conduct such training programs has resulted in wildcat strikes being called against them. See *Bangor & Aroostook R. R. Co.* v. *BLF&E,* 255 F. Supp. 476 (D. D. C. 1966). Again, the record is clear that these training programs are strictly on the initiative of the BLF&E, as acknowledged by its chief witness at the trial:

"Q. And training to become an engineer after he has been a fireman doesn't take place for a few years, does it?
A. Not until after five years.
Q. So that after he has served as a fireman for five years he then would come to your school to take instructions to pass the engineer's examination?
A. That is correct.
Q. That school is a Brotherhood school?
A. That is correct.
Q. You run it?
A. That's right.
Q. The railroad doesn't have anything to do with it?
A. That's right."

It is not only illogical but the height of irony to use the training insisted upon and provided by the BLF&E to excise the term "helper" from the statute.

The BLF&E has also pointed to the presence of a fireman as the second man on passenger locomotives as a claimed concession by the Railroads that only a fireman may satisfy the "helper" requirement of Section 54-b. But again, a fireman, as opposed to a brakeman, is the second man on a passenger locomotive because the collective bargaining agreements with the BLF&E require him there (413a; 4910a) and the head brakeman is used in the train itself to assist the passengers (465a).

The Court of Appeals ignored the conceded fact that firemen are required to have no more qualifications than brakemen or other operating personnel; likewise, it ignored the refusal of some of the Railroads to require firemen to qualify as engineers; also, it ignored the fact that whatever

training the fireman does receive as an engineer on some Railroads is done on the initiative of the BLF&E. Its silence on these vital and conceded facts exposes more eloquently than words the obvious fallacy of its decision. The fact is that a fireman is not an assistant engineer and never has been regarded as such (1774a). The fireman's lack of qualifications as an engineer in fact formed the basis for a demand by the BLF&E that two engineers be assigned to diesel locomotives. This demand, the subject of intensive collective bargaining, was finally rejected. *Report of Emergency Board No. 68* (1949). Section 54-b does not require a second engineer on a locomotive, and it was error for the courts below to interpret the statute as requiring "an engine crewman fireman-type assistant to the engineer" (A-65).

THE QUESTION IS SUBSTANTIAL

Section 54-b of the New York Railroad law is unconstitutional special class legislation.

In effect the Court of Appeals held that a railroad commits a crime if it uses as a helper a brakeman who has passed the same physical examination a fireman takes, who has taken the same three student trips a fireman takes, and who has passed the same examination on the operating rules. Yet, according to the Court of Appeals, the same person hired as fireman and going through the identical process satisfies the requirement of a "helper".

This construction nowhere appears on the face of statute. On the contrary, it is reached only by excising the term "helper" from the statute and ignoring the indisputable facts of record. The Railroads contended against such a construction, pointing out that without any justification,

in fact it bestows upon the members of the firemen's union the sole and exclusive privilege of serving as helpers on diesels. The Court of Appeals, at the urging of the BLF&E, insisted upon such a construction, and in so doing, rejected the doctrine that this Court enunciated in *Smith* v. *Texas,* 233 U. S. 630.

That case involved a provision of the Texas Penal Code requiring all conductors on freight trains to have two years experience as brakemen. The Texas court had held this requirement to be a valid exercise of police power since conductors were normally promoted from the ranks of brakemen, just as engineers are normally promoted from the ranks of firemen. *Smith* v. *Texas,* 66 Tex. Crim. 383, 146 S. W. 900 (1912). This Court held (pp. 638-41):

> ". . . None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position.
>
> ". . . The statute does not require the brakeman to prove his fitness, though it does prevent all others from showing that they are competent. The act prescribes no other qualification, for appointment as conductor, than that for two years the applicant should have been a brakeman on a freight train, but affords no opportunity to any others to prove their fitness. It thus absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor on a freight train.
>
> "For it is to be noted that under this statute, not only the general public, but also four classes of rail-

road men, familiar with the movement and operation of trains and having the same kind of experience as a brakeman, are given no chance to show their competency but are arbitrarily denied the right to act as conductors

* * *

"3. So that the case distinctly raises the question as to whether a statute, in permitting certain competent men to serve, can lay down a test which absolutely prohibits other competent men from entering the same private employment. It would seem that to ask the question is to answer it . . . A statute which permits the brakeman to act—because he is presumptively competent—and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent, is not confined to securing the public safety but denies to many the liberty of contract granted to brakemen and operates to establish rules of promotion in a private employment.

"If brakemen only are allowed the right of appointment to the position of conductors, then a privilege is given to them which is denied all other citizens of the United States. If, the statute can fix the class from which conductors on freight trains shall be taken, another statute could limit the class from which brakemen and conductors on passenger-train could be selected, and so, progressively, the whole matter, as to who could enter the railroad service and who could go from one position to another, would be regulated by statute."

The lower courts seized upon the success of the BLF&E on some of the Railroads in requiring that firemen be trained as engineers and eventually qualify as such, and in some vague, unexplained way intimated that these requirements justify excision of the term "helper" from the statute. These requirements, however, are nowhere embodied in the statute, and the necessary consequence of the lower courts' construction has been to delegate to the BLF&E the power to determine in its sole and nonreviewable discretion the standards and qualifications for "helpers."

The lower courts also held by necessary implication that the qualifications for "helpers" can constitutionally vary from Railroad to Railroad because, as revealed above, the qualifications do in fact vary depending upon the bargaining strength of the particular local BLF&E lodge involved. But the Legislature cannot delegate its power to the BLF&E and it was an error for the Court of Appeals to confer upon the BLF&E the exclusive franchise to determine who shall and who shall not be the second man on the locomotive.* *Washington ex. rel. Seattle Trust Co.* v. *Roberge*, 278 U. S. 116.

The decision of the Court of Appeals is not only contrary to the doctrine set forth in *Smith* v. *Texas, supra* p. 15, but also is in conflict with the decisions in other states considering directly analogous problems.

Northern Pacfic Ry. Co. v. *Warren*, 77 N. D. 721, 45 N. W. 2d 196 (1950), struck down a law requiring flag-

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*In light of the total abdication of power to the BLF&E to determine who may be the second man on the engine, the extended discussion by the Court of Appeals of the inadvisability of permitting the Public Service Commission to exercise such power is puzzling (A-67-69).

men on ballasters to be train service employees. The court stated (45 N. W. 2d 204-205):

> "The record clearly shows that members of the maintenance of way gangs, customarily perform flagging duties and presumably they are competent to do so, for they regularly perform these functions. . . . The legislature has never by general law undertaken to establish standards for determining the qualifications of those who may perform flagging duties. . . . The attempt made to . . . exclude the employment of other flagmen who may be equally competent to perform the duties under consideration appears to be without reasonable justification, and is violative of Article 1, Section 20, of the North Dakota Constitution."

In *Missouri-Kansas-Texas Railroad Co.* v. *State,* 131 S. W. 2d 702 (Tex. Civ. App. 1939), *writ of error refused* (Tex. Sup. Ct. 1939), the court held that in absence of legislatively supplied standards and qualifications for the brakemen required by the Texas full crew laws "the presence of more than two men on [a construction train] who were fully qualified, trained and available to discharge all of the duties regular brakemen could have discharged, had they been present, was sufficient to meet the safety requirements contemplated by the statute, and that the law was not violated in this regard."

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *State,* 33 Ariz. 440, 265 Pac. 602 (1928), the court voided as unconstitutional a statute requiring anyone who received or transmitted train orders by telephone, including train crew members, to have at least one year's experience as a telegraph operator.

The main reason given by the Court of Appeals for its unconstitutional construction was its speculation that the Legislature intended the term "helper" to be a redundancy when it enacted the statute (A-62-64). It would be equally valid to speculate that in using the phrase "fireman or helper" the Legislature envisaged the eventual phasing out of the fireman on diesels as has been in fact the case in other states. But even if the Court of Appeals guessed right in the matter of legislative intent, it ignored at its peril the elementary principle of statutory construction that where one reading of the statute will save its constitutionality, and another reading will render it unconstitutional, the constitutional choice should be made. *United States* v. *Harriss,* 347 U. S. 612; *United States* v. *C. I. O.,* 335 U. S. 106; *Chippewa Indians* v. *United States,* 301 U. S. 358.

The Court of Appeals hailed the Public Service Commission of New York as being "knowledgable in railroad problems" and imbued "with the history and development of statutes and public regulation affecting railroads" (A-65). Notwithstanding this recognition of expertise in dealing with the issue before it, the Court of Appeals chose to ignore the interpretation the Commission gave to the term "fireman or helper." This interpretation is at direct odds with that of the Court of Appeals. New York Public Service Commission Case No. 24598, *Complaint of BLF&E against Canadian National Railway* (1968), printed as an appendix to this statement at A-78.

That case passed upon the legality of the assignment by the Canadian National Railway of a brakeman (yardman) to act as "a helper who is to assist the engineer." The BLF&E maintained that a fireman was required on the locomotive. The Commission dismissed the complaint finding (A-86-87):

"Much of the record is concerned with the relative qualifications of the fireman-helper and the yard helper. Both must pass a physical examination before being hired and pass the same examination on the company's operating rules. Each makes three trial runs, the fireman-helper receiving instruction as to his duties on the engine and the yard helper on the handling of cars. The fireman-helper receives training thereafter in preparation for qualification as an engineer."

* *

"It appears that the yard helper and the yard foreman are both qualified by training in the company's operating rules to perform the required duties of firemen-helper in the transfer operation under consideration. It is recommended, therefore, that the complaint be dismissed."

The statement by the Court of Appeals that "[T]here cannot be the slightest doubt" that the Public Service Commission construed § 54-b as requiring an assignment "which would not be satisfied by the presence of a brakeman" is, to say the least, a slight exaggeration (A-65).

The record bears out the conclusion of the Public Service Commission. It shows that head brakemen regularly act as helpers to the engineers (884a-85a; 2661a-64a). The lower courts made no comment on the evidence of operations without firemen on the Canadian Pacific (2515a-41a). This silence is as significant as the failure to discuss the decision of the Public Service Commission. That evidence showed that the head brakeman on the Canadian Pacific for years has rendered all the help that the engineer requires in freight and yard operations (2572a-75a; 2580a-83a). Similarly, the lower courts made no comment on the evidence of operations in adjoining states without firemen (*e.g.*

3665a-71a). Instead, they proceeded on the premise that the law requires a helper to be a second engineer. But the law does not read that way and, besides, the fireman in many instances is not such a person (1774a).

Respondents may urge affirmance of the decision below on the strength of the recent decision by this Court in *BLF&E* v. *Chicago, R. I. & P. R. Co.*, U. S. , 89 S. Ct. 323, 37 U. S. L. W. 4032 (November 18, 1968), upholding the Arkansas minimum crew laws. With respect to this argument we cannot improve upon the position set forth by the BLF&E in its argument to the Court of Appeals in this case:

> "The distinction between the Arkansas case, where the sole alleged vice of the statute was the requirement of a six-man crew, and this case is stated by the appellants themselves who assert (Br. 47):
>
> > 'The vice in Section 54-b is not that it requires a two man crew, but rather that it requires the Railroads to employ a so-called fireman in every freight and yard operation throughout the State. They must do so regardless of how many other qualified men are available in the crew to help the engineer.'"

In the final analysis the propriety of the decisions below hinges upon the following analysis by the trial court, implicitly adopted by the Court of Appeals (A-28):

> "Even if it be assumed that in road freight service the head brakeman is in all respects as competent as the fireman to perform and does adequately perform the duties assigned to both which are necessary in the interest of safety, it may not be held that the statutory rule is unconstitutional because the railroad rule adequately protects against the same hazards."

The foregoing statement is a masterpiece of illogic. The Railroads do not say that the helper to the engineer must be a brakeman and only a brakeman. What they do say is that given the conceded facts that brakemen receive the same training as firemen, that they act as helpers to the engineers in Canada and other states and that use of firemen having no more training or qualifications than brakemen satisfies § 54-b, they cannot be constitutionally required to use firemen to the total exclusion of brakemen.

In point of fact, the lower courts, not the Railroads, are the ones who are relying upon the rules and practices forced upon some, but not all, of the Railroads by the BLF&E to sustain the constitutionality of § 54-b as special interest legislation. But there is nothing in the law requiring these programs and in fact they have not been carried out by some of the Railroads. Yet all of the Railroads have concededly been complying with the law since its inception.

CONCLUSION

The Railroads of the State of New York are under an unconstitutional compulsion to provide employment to the members of a labor union solely on the basis of their being labelled "firemen." The decision of the Court of Appeals should be reversed.

Respectfully submitted,

JOHN A. WELLS
CAESAR L. PITASSY
DAVID F. DOBBINS
IAN R. GILBERT
200 Park Avenue
New York, New York 10017

Of Counsel:
GERALD E. DWYER
New York, New York
VICTOR F. CONDELLO
New York, New York
ROYALL, KOEGEL, ROGERS & WELLS
New York, New York